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No. 97-1078

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1997

CATHERINE A. GHIGLIERI,
TEXAS BANKING COMMISSIONER,
Petitioner,

v.

EUGENE A. LUDWIG, COMPTROLLER OF THE CURRENCY;
SUN WORLD NATIONAL ASSOCIATION, EL PASO, TEXAS; AND
COMMERCIAL NATIONAL BANK OF TEXARKANA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT COMMERCIAL NATIONAL BANK OF TEXARKANA IN OPPOSITION

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly held that the Comptroller of the Currency permissibly construed section 30(b) of the National Bank Act, 12 U.S.C., to allow a national banking association in a *bona fide* relocation of its main office from Texarkana, Arkansas, to Texarkana, Texas, a distance of less than 30 miles, prior to June 1, 1997 (the date certain amendments to the National Bank Act contained in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 became applicable), to retain the association's previously owned and operated branch banks located in the State of Arkansas.

Whether the United States Court of Appeals for the Fifth Circuit correctly held that the Comptroller of the Currency, pursuant to section 36(c) of the National Bank Act, 12 U.S.C., and the branch banking laws of the State of Arkansas, properly allowed a national banking association that relocated its main office to the State of Texas and retained its previously owned and operated branch banks in the State of Arkansas prior to June 1, 1997, to establish a new branch bank at the site of its former main office in the State of Arkansas.

PARTIES TO THE PROCEEDINGS

The petition accurately identifies the parties. Pursuant to Supreme Court Rule 29.6, Respondent Commercial National Bank of Texarkana states that its parent holding company is Commercial Bancshares, Inc., a one-bank holding company incorporated in the State of Arkansas.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT COMMERCIAL NATIONAL BANK OF TEXARKANA IN OPPOSITION

Commercial National Bank of Texarkana (the "Bank") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Catherine A. Ghiglieri, Texas Banking Commissioner (the "Texas Commissioner"), to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Ghiglieri v. Ludwig*, 125 F.3d 941 (1997) (Petitioner's Appendix ("Pet. App.")B).

STATEMENT OF THE CASE

The Bank is a small national banking association with about $92 million in assets and $82 million in deposits (Pet. App. F-1). The main office of the Bank is in Texarkana, Miller County, Arkansas (*Id.*). The Bank also operated three branch banks and an ATM in Miller County (*Id.*). The Texarkana metropolitan area is unusual in that the state line between Arkansas and Texas bifurcates the population. Because no natural boundary forms that dividing line, the ability of the Bank to operate in both Texas and Arkansas would make banking more convenient and accessible to all residents of the Texarkana area, whether they live or work in Texas or Arkansas (Respondent's Appendix ("Resp. App.") A-5-6). Also, areas of Texarkana, Texas, were experiencing a tremendous amount of construction and rapid growth (Resp. App. B-6). The Bank proposed to relocate its main office to that locale.

The solution to these inconveniences for residents and the response by the Bank to the opportunity seemed apparent. The Bank filed with the Comptroller of the Currency (the "Comptroller") two applications, both of which appeared routine in light of applications of other banks previously approved by the Comptroller. The first application sought to relocate the main office of the Bank from Arkansas to Texas and retain the branch banks in Miller County. (Pet. App. F-1). The proposed location in Texas was only two miles from the city limits of Texarkana, Arkansas (Pet. App. F-1). A permanent new main office in Texarkana, Texas, was to be constructed at a cost of about $1,500,000 (Pet. App. D-9, 10). The second application sought approval to establish a new branch bank at the location of the Bank's former main office in Arkansas (Pet. App. F-1). The Texas Commissioner and the Arkansas State Bank Department were notified of the applications, and both filed objections to the applications.

Relying on numerous prior approvals of other applications that presented virtually the same factual and legal scenarios, the Comptroller in March 1995 approved both of the Bank's applications (Pet. App. F-1). Because of the length of time necessary to construct the new facility in Texas, the Bank later applied to the Comptroller for approval to open a temporary main office in Texas (Resp. App. B-6). This request was approved by the Comptroller (Resp. App. B-1). The temporary main office was opened (Pet. App. D-10).

The Texas Commissioner instituted this action immediately after the Bank opened its temporary main office in Texas. The Arkansas Commissioner is not and has not been a party to this case. At oral argument before the district court, the Texas Commissioner withdrew her contention that the Bank could not relocate its main office across State lines within 30 miles distance from its former main office (Pet. App. D-18 n.8). The district court found that the temporary main office was not "a branch office in disguise" (Pet. App. D-18). The district court held, however, that retention of the Bank's Arkansas branches upon relocation of its main office to Texas was not in accordance with law and, based in large part on this erroneous conclusion, that the Bank could not establish a new branch bank at the location of its former main office in Arkansas (Pet. App. D-19-40). The district court set aside the Comptroller's decisions on the Bank's applications and enjoined the Bank's banking operations in Texas.

The Fifth Circuit reversed the district court. The court relied on this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and its prior decision in *Ghiglieri v. Sun World Nat'l Ass'n*, 117 F.3d 309 (5th Cir. 1997), to defer to the Comptroller's permissible construction of section 30(b) of the National Bank Act to allow retention of the Bank's pre-existing

branches in Arkansas following the establishment of the new main office in Texas. The court next concluded under section 36(c) of that Act that Arkansas state branch banking law allowed the Bank to continue to use the site of its former main office as a branch bank in Arkansas.

REASONS FOR DENYING THE PETITION

The petition should be denied for the following reasons. The Comptroller applied section 30(b), 12 U.S.C., of the National Bank Act, which permits relocation of a national banking association's main office by up to 30 miles, to approve the Bank's relocation of its main office from Texarkana, Arkansas, to Texarkana, Texas (a distance of about 6 miles) (Resp. App. A-2). The Texas Commissioner conceded in the district court the propriety of this construction and application of section 30(b) (Pet. App. D-18 n.8). The Comptroller next permissibly construed section 30(b) to permit the Bank to retain the branch banks that it previously owned and operated in Arkansas and not to require divestiture of those branch banks upon relocation of the Bank's main office. The Fifth Circuit properly held that this construction was reasonable in the absence of clear Congressional intent in accordance with this Court's directive in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), of the proper analysis to apply in reviewing an agency's interpretation of the statute it administers.

The Comptroller's construction of section 30(b) was recognized by Congress in the course of its consideration of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (the "Riegle-Neal Act") (Pet. App. K). Previous consistent interpretations by the Comptroller of section 30(b) were explicitly approved for main office relocations and branch bank

retention occurring before June 1, 1997, at which time new limitations on the ability of a national banking association to retain its branches when relocating its main office became applicable. Thus, the decisions of the Fifth Circuit in this case and *Ghiglieri v. Sun World Nat'l Ass'n*, 117 F.3d 309, in which the Texas Commissioner also petitions for a writ, will not apply to relocations occurring after May 31, 1997.

No conflict of authority exists among the United States courts of appeals as to the Comptroller's interpretation of section 30(b). The only prior court of appeals decision in point reached the same result as did the Fifth Circuit in this case.

The Comptroller also properly applied section 36(c), 12 U.S.C., and Arkansas state branch banking law to allow the Bank to establish a new branch bank in the State of Arkansas at the site of its former main office. This determination was also upheld by the Fifth Circuit and requires nothing more than application of the banking laws of the State of Arkansas. The petition fails to challenge that determination.

A. CONGRESS WAS AWARE OF THE COMPTROLLER'S INTERPRETATION OF SECTION 30(b) WHEN IT PASSED THE RIEGLE-NEAL ACT

(1) **Expansion of Banking Activities**

The history of bank regulation in this country is essentially one of periods of great crisis leading to further expansion of the ability of banks to offer a greater number of services defined as banking and the geographic area in which those activities take place. Thus, the Civil War, the Depression, the oil and gas and real estate collapse of the '80s, and global economic competition all led to further expansion of the permissible activities of banks and the gradual expansion of the geographic area in which those activities take place.

P. Mulloy and C. Lasker, *The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994: Responding to Global Competition*, 21 J. Legis. 255, 256-257 (1995).

A recent Congressional reaction to the banking crisis of the '80s is the Riegle-Neal Act. Congress and most States have now approved a system that makes it possible for a single national bank with its main office in one State, having only one charter, to open branches in other States, regardless of location. The Riegle-Neal Act accomplishes this in essentially two ways. First, the Act repealed the Douglas Amendment to the Bank Holding Company Act of 1956, which prohibited a bank holding company from acquiring a bank in another State unless that State authorized the acquisition. The Riegle-Neal Act §§ 101(a), (e). After June 1, 1995, a bank holding company may acquire a bank in any State, regardless of that State's law on interstate acquisition. Second, as of June 1, 1997, and subject to several conditions, the Riegle-Neal Act provides express federal authorization for interstate branch banking, including merger transactions and opening new branches across State lines.

The Riegle-Neal Act is significant, but by 1994 technological and regulatory changes had ameliorated to a large extent customer inconvenience that might have otherwise existed because of the restrictions on the location and limitations on the size of banks. The variety of techniques that have been available to banks to expand the breadth of services and the geographic areas of operations have been numerous. One important technique has been the use of a bank holding company, which allowed a holding company to cross State lines so long as the individual banks remained legally independent of one another. Co-operation among banks in providing correspondent banking relations and establishment of loan production offices also lessened the effect of the ban on interstate banking. Banks could receive depos-

its from anywhere, and, within limits, lend anywhere. The ability of banks to use ATM machines as part of their customer service has eased the inconvenience of the lack of interstate banking. The expansion was so dramatic that by 1993, forty-six states and the District of Columbia, contrary to historic opposition and prohibition, permitted statewide branching. M. Indick and S. Kini, *The Interstate Banking and Branching Efficiency Act: New Options, New Problems*, 112 Banking L. J. 100, 103 (1995). These two authors opined that as to interstate banking, the Riegle-Neal Act codified "what had already occurred in practice." Id. at 104.

Several commentators, reviewing these market-driven responses to limitations on banking, included a discussion of one other response: the change in location of the main office and retention of branches in the State of the former main office. The first step in this procedure, relocating the main office across State lines, was so unarguably allowed under section 30(b) that the Texas Commissioner conceded the point in the trial court (Pet. App. D-18). Without exception, the use of section 30(b) to relocate the main office but retain branches was viewed with approval and in accordance with the intent of Congress and the authority of the Comptroller. The commentators believed that the 30-mile provision of section 30(b) was appropriately and legally used to establish a limited network of interstate banks. More importantly, these commentators also believed that the Riegle-Neal Act, by permitting the use of this procedure until June 1, 1997, sanctioned its use until that date. See M. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 Harv. J. on Legis. 183, 208-209 (1996) ("interstate branching is already the law"); M. Indick & S. Kini, *supra*, 112 Banking L. J. at 108, 116-117 (1995) (the Riegle-Neal Act "may be read to endorse the Comptroller's interpretation of Section 30").

(2) **A Clear Expression of Congressional Intent**

With this background in mind, the correctness of the Fifth Circuit's deference to the Comptroller's interpretation of section 30(b) is apparent. In the House Conference Report, Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. No. 103-651, 5 U.S. Code Cong. & Admin. News, 103d Cong., 2d Sess. 2039-2089 (1994), the intent of Congress — that Congress desired broader interstate banking and passed the Riegle-Neal Act to achieve that end, but in the meantime also approved existing procedures to achieve that result — could not have been made clearer. The conferees recognized that the Comptroller

> has used the 30 mile relocation provision of the National Bank Act (section 2 of the Act of May 1, 1886, 12 U.S.C. 30), to approve several transactions which have permitted national banks to move their main offices to other States but to retain branches in the States left by the main offices.

Id. at 2078. This procedure is of course exactly what the Comptroller did in this case. The conferees next stated that the Riegle-Neal Act

> amends the provision so that after June 1, 1997, a national bank relocating its main office to another state may maintain its branches in the first state only if those branches could have been established by a bank with its home State in the new State.

Id. This statement shows that the amendment to section 30 imposed a new condition, applicable June 1, 1997, when the new interstate merger provisions became applicable. The concluding remarks make their intent absolutely clear.

> The Conferees are aware of the OCC procedures in permitting relocation across state lines. The Conferees

> concur with those procedures, including the application of appropriate State law and authority. The Conferees expect the OCC to continue to follow those procedures until the provisions of Title I [the interstate banking provisions] become fully applicable on June 1, 1997.

The essential elements of the Comptroller's position in this case — relocation of the main office across state lines and retention of branch banks — had clearly been approved by the Comptroller prior to passage of the Riegle-Neal Act. Congress was, beyond peradventure, aware of these interpretations. Scholars in the field thought all this noteworthy, but not beyond the scope of the Comptroller's authority. The Texas Commissioner disingenuously relegates this direct Congressional authority to a footnote (Petition at 23 n.20) with a characterization that it is a mere "snippet," while simultaneously attempting to bolster criticism of prior actions of the Comptroller unrelated to any issue in this case. The legislative history of the Riegle-Neal Act shows unmistakably that when Congress and the conferees intended to be critical of the Comptroller's actions in other areas, they knew how. The unqualified approval of the Comptroller's actions that form the basis of this case are thus all the more authoritative.

The petition ignores the import of the Comptroller's decisions in existence at the time of Congressional consideration of the Riegle-Neal Act. Analysis of those decisions, however, shows they are precisely in point with the Comptroller's decision on the Bank's applications. For example, in *First Fidelity*[1], the bank applied to the Comptroller for approval to relocate its main office from Philadelphia to Salem, New Jersey — a distance of about 24 miles. The bank also

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1 Decision of the Office of the Comptroller of the Currency on the Applications of First Fidelity Bank, N.A., Pa., and First Fidelity Bank, N.A., N.J. (Jan. 10, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,644 at 83,967.

requested permission to continue to operate its existing branches in Pennsylvania.

The Comptroller under section 30(b) approved the bank's relocation of its main office to New Jersey. The Comptroller next concluded, as he did on the application of the Bank here, that the relocation of the main office did not require divestiture of the bank's existing branches. The Comptroller held that:

> Since Congress did expressly address branch retention in the context of conversions and consolidations but did not address branch retention in the relocation context, it is difficult to infer that the 1927 Congress intended the 1927 [McFadden] Act or its branch retention rules to apply in the context of main office relocations. . . . The absence of any treatment of branch retention in main office relocations in the 1927 Act or its legislative history strongly suggests that Congress intended main office relocations and the concomitant retention of existing branches to be left unchanged and left to section 30.

Id. at 83,986.[2]

For this Court, however, the most telling feature of the Riegle-Neal Act amendments to sections 30 and 36 is that new limitations on the ability of a national banking association to relocate its main office and to retain its branches after May 31, 1997, have now become applicable. See sections 30(c) and 36(e)(2), 12 U.S.C. As the Fifth Circuit recognized in its decision in *Sun World*, 117 F.3d at 314, relying directly on this Court's decision in *NationsBank of North Carolina,*

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2 In the Decision of the Office of the Comptroller of the Currency on the Applications of American Security Bank, N.A., Washington, D.C., and Maryland Bank, Baltimore, Md. (February 4, 1994), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 89,695, at 84,266, the Comptroller followed essentially the same analysis as in *First Fidelity*.

N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257-59 (1995), the imposition of a Congressional limitation on a national banking association's authority is logical only if the bank already had the authority. The effect of these provisions, even if the Texas Commissioner's arguments had any validity, severely diminishes the importance of any construction of sections 30(b) or 36(c) as they applied before June 1, 1997.[3]

(3) No Conflict in the United States Courts of Appeals

The Texas Commissioner's contention that a conflict exists among the United States courts of appeals on the construction of section 30(b) is erroneous and a transparent attempt to create a reason for granting her petition. The only case seriously urged as being in conflict, *Marion Nat'l Bank v. Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969), was not only decided twenty-nine years ago but is readily distinguishable as involving only the issue of creation and establishment of a new branch. Thus, the decision properly rested on an application of section 36(c). Section 30 was not even cited by the Seventh Circuit. The Texas Commissioner recognizes in her petition that the relocation of the main office must be *bona fide* and admits that the bank's action in *Marion* was not

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3 The Texas Commissioner struggles to make this issue, now supplanted by explicit provisions in the Riegle-Neal Act, into a significant problem involving many banks. The authority cited for this proposition wholly fails to support the Texas Commissioner's position and in fact contradicts it. *See Overview of Proposed Rule and Comments*, 62 Fed. Reg. 47,728-29. The implication that the Fifth Circuit's decision will result in unrestrained "seriatim relocations" (Petition at 21) ignores the geography of the State of Texas, the 30-mile limitation contained in section 30(b), the $1,500,000 financial commitment of the Bank to construct a new main office, and the ability of the Comptroller to regulate inappropriate activity.

(Petition at 24). Here, the contention of the Texas Commissioner that the Bank's relocation was not *bona fide* was so thoroughly rejected by the trial court that no appeal of that finding was attempted. On the other hand, the consistent interpretation of section 30(b) was exemplified by the decision of the Third Circuit in *Ramapo Bank v. Camp*, 425 F.2d 333 (3d Cir.), *cert. denied*, 400 U.S. 828 (1970). In Ramapo, the court concluded that branching considerations, and thus section 36, were "inapplicable to the main office relocation" and that the issue was solely governed by construction of section 30(b). 425 F.2d at 345. Also, as shown above, after May 31, 1997, the issues presented by the petition are explicitly controlled by sections 30(c) and 36(e)(2) of the Riegle-Neal Act. These sections impose new limitations on the ability of a bank that relocates its main office to retain its branches. These new sections have no application to this case.

B. The Establishment of a New Branch Bank at the Site of the Former Main Office of the Bank is Authorized by the Branch Banking Laws of the State of Arkansas

The parties agreed that section 36(c) of the National Bank Act governed the establishment of a new branch bank at the location of the Bank's prior main office in Texarkana, Arkansas, after relocation of the Bank's main office to Texas. Section 36(c) provides that a national banking association can establish and operate new branches "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question." The Comptroller approved this new branch on two separate grounds, but Arkansas state banking law offered such an easy answer

to this issue that the Fifth Circuit relied solely on Arkansas Code Annotated § 23-32-1202(b)(2), which provides that

> [a] bank which relocates its principal banking office may continue to use its former principal banking office location as a full service branch and customer-bank communication terminal so long as the use as a banking facility is uninterrupted.

The Fifth Circuit's application of this Arkansas statute is not challenged in the petition, either as to the appropriateness of the reference to the Arkansas statute or the interpretation of that statute. Thus, there is no dispute that the Comptroller's interpretation of section 30(b) leads to the conclusion that the Comptroller properly approved the Bank's second application to open a new branch at the site of its former main office.

CONCLUSION

The petition should be denied.

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